

SHIPPING | AUGUST 2021

FEDERAL MARITIME COMMISSION ENFORCEMENT INQUIRY SIGNALS INCREASED SCRUTINY FOR SHIPPING INDUSTRY

The lingering effects of COVID-19 on the global supply chain and related port congestion has impacted multiple stakeholders. The container shipping industry is no exception. The Federal Maritime Commission (**FMC**) recently initiated an expedited Enforcement Inquiry into the legality of congestion charges, in particular demurrage and detention charges. The genesis of the Enforcement Inquiry is a March 31, 2020 Order of Investigation that called on the FMC to "engage supply chain stakeholders in public or non-public discussions to identify commercial solutions to certain unresolved supply chain issues that interfere with the smooth operation of the U.S. international supply chain". The Enforcement Inquiry comes on the heels of a July 9, 2021 Executive Order issued by the Biden Administration. The recent turn of events indicates that the FMC's enforcement branch may take a more active role during the Biden Administration than in the past.

The FMC's Role in U.S. Shipping

The FMC is an independent federal agency tasked with the regulation¹ of the United States' "international ocean transportation system", doing so for the benefit of all parties including importers, exporters, and consumers. The FMC's mission statement is to "[e]nsure a competitive and reliable international ocean transportation supply system that supports the U.S. economy and protects the public from unfair and deceptive practices."

The FMC is commonly associated with the registration and/or licensing of Ocean Transportation Intermediaries (**OTI**), which includes freight forwarders and Non-Vessel-Operating Common Carriers (**NVOCC**), and Vessel-Operating Common Carriers (**VOCC**). The FMC also has regulatory authority over agreements between marine terminal operators and VOCC.

Although not as widely known, the FMC's Bureau of Enforcement (**BOE**) serves as its prosecuting component to enforce FMC regulations and issue penalties for violations. The BOE investigates potential violations of the Shipping Act of 1984 and FMC regulations, and it conducts other fact-finding investigations initiated under the U.S. shipping laws within the FMC's jurisdiction. The BOE is also involved with the negotiation of settlements and informal compromises of civil penalties.

FMC Fact Finding 29: International Ocean Transportation Chain Engagement

Starting with an Order of Investigation issued on March 31, 2020, the FMC has investigated COVID-19 cargo delivery challenges. The original March 31 Order of Investigation focused on commercial solutions. In a supplemental order issued on November 19, 2020 to address certain stakeholders' concerns, the FMC was further charged with investigating practices by alliance carriers who call on the Port of New York and New Jersey or who call on the Port of Long Beach and the Port of Los Angeles to determine whether they comply with U.S. shipping laws.² As noted in a December 17, 2020 Advice to Trade, the assessment of demurrage and detention charges by ocean carriers and marine terminal operators was a focal point of the investigation.

On July 28, 2021, the FMC issued Interim Recommendations, which stated:

¹ The principal statutes administered by the FMC, codified in Title 46 of the U.S. Code at sections 40101 through 44106, are: (1) The Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998, (2) The Foreign Shipping Practices Act of 1988, (3) Section 19 of the Merchant Marine Act, 1920; and (4) Sections 2 and 3 of Pub. L. No. 89-777, 80 stat.1350.

² Specifically, 46 U.S.C. § 41102(c) which states " A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property."

Congress should amend 46 U.S.C. § 41104(a)(3) to broaden the anti-retaliation provision so that it applies to all regulated entities and protects anyone who complains to the FMC about potentially unlawful conduct.

Congress should amend 46 U.S.C. § 41305(c) to authorize the FMC to order double reparations for violations of 46 U.S.C. § 41102(c).

Congress should amend 46 U.S.C. §§ 41109 and 41309 to allow civil penalties assessed by the FMC to be paid to private parties.

For private party complaints, the FMC should issue guidance on the recovery of attorney fees, costs, and other case expenses.

The FMC should solicit industry views on whether ocean common carriers and marine terminal operators should provide greater transparency regarding the timing of demurrage and detention billings.

On July 20, 2021, the FMC announced the establishment of a new audit program to assess carrier compliance with FMC regulations on detention and demurrage as well as to provide additional information beneficial to the regular monitoring of the marketplace for ocean cargo services. The FMC stated that the audit program was initiated to address widespread and prolonged complaints from importers, exporters and motor carriers regarding increasing demurrage and detention charges assessed during periods of port congestion and growing scrutiny by Congress.

The July 9, 2021 Executive Order

The FMC's recent actions do not stand in isolation. Rather, the FMC appears to be responding to President Biden's July 9, 2021 Executive Order entitled "Promoting Competition in the American Economy" (the **EO**). The EO's stated purposed was to strengthen the open market in the United States and to promote fair competition.

With respect to shipping, the EO encouraged the FMC "to ensure vigorous enforcement against shippers charging American exporters exorbitant charges" and to "consider further rulemaking to improve detention and demurrage practices and enforcement of related Shipping Act prohibitions". The EO instructed the FMC to revisit antitrust policies, as in recent years the maritime cargo industry has seen substantial consolidation among a select few carriers; a further cause of elevated consumer costs within the shipping industry.

Shortly following the EO's proclamation, on July 12, 2021, the FMC and U.S. Department of Justice's Anti-Trust Division (**DOJ**) issued a Memorandum of Agreement (**MOA**). The MOA signalled greater cooperation between the FMC and DOJ to achieve the stated goal of "promoting competitive conditions in the U.S.- International Ocean Liner Shipping Industry."

The August 2021 FMC Enforcement Inquiry

In early August 2021, the FMC launched an expedited inquiry into the timing and legal sufficiency of ocean carrier practices with respect to certain surcharges. The BOE asked eight ocean carriers to provide details about congestion or related surcharges they have implemented or announced. This action was taken in response to communications received by the FMC from multiple parties reporting that ocean carriers are allegedly improperly implementing congestion surcharges. In an August 4, 2021 FMC News Release Chairman, Maffei was quoted as follows:³

"The COVID-related spike in demand for imports has pushed cargo rates to record highs," said FMC Chairman Maffei. "Now, we hear increasing reports of ocean carriers assessing new additional fees, such as 'congestion surcharges,' with little notice or explanation."

"The congestion is due mostly to the tremendous volume of traffic coming from ocean carriers and through ports to satisfy the record demand for imports. Far from being a sudden occurrence or isolated to a port or geographical area, congestion of the freight transportation system is everywhere and has been going on for many months. It seems to me that these factors would already have been included into the record high rates charged by the carriers. As Chairman, I want to know the carriers' justifications for additional fees and I strongly support close scrutiny by the FMC's Bureau of Enforcement aimed at stopping any instance where these add-on fees may not fully comply with the law or regulation," concluded Chairman Maffei.

Based on the responses of the carriers, the FMC will determine: (1) if the surcharges were implemented following proper notice; (2) if the purpose of the surcharge was clearly defined; and (3) if it is clear what event or condition triggers and/or terminates the surcharge. If the FMC finds that a tariff was improperly established, it can take enforcement action.

Conclusion

For the past year, there has been significant regulatory and political attention on COVID-19 supply chain issues. The FMC's August 4, 2021 Enforcement Inquiry follows FMC Chairman Maffei's comments at a June 15, 2015 hearing of the

³ The News Release entitled "Commission Questions Shipping Lines About Surcharges" was posted on August 4, 2021 on the FMC's website: <https://www.fmc.gov/commission-questions-shipping-lines-about-surcharges/>

U.S. House of Representatives Subcommittee on the Coast Guard and Maritime Transportation on Impacts of Shipping Container Shortages, Delays, and Increased Demand on the North American Supply Chain.

While ocean shipping and intermodal transportation charges are historic points of contention between industry stakeholders, the change in Administration and the FMC's announcements make it clear that there will be greater regulatory scrutiny in this area, which may lead to vigorous enforcement action.

The EO also calls on the DOJ to cooperate with the FMC and other agencies on the investigation and enforcement of existing antitrust laws. The practical impact of the DOJ's role in this ocean shipping and intermodal transportation area remains to be seen.

Stakeholders should carefully monitor these developments as the FMC and DOJ implement the EO. Stakeholders should also consider reviewing their current contractual arrangements and ensure that their compliance programs can withstand heightened regulatory scrutiny.

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